1959 *Present :* **Sansoni, J.**

THE ATTORNEY-GENERAL, Petitioner, *and* K. SIVAPRAGASAM *et al.*, Respondents

S. C. 140—Application for Revision in M. C. Colombo, 11,286/A

Criminal procedure—Summary trial—Right of Crown Counsel to appear for complainant—Right of prosecuting Counsel to decide not to place evidence before Court—Criminal Procedure Code, ss. 148 (1) (a), 189 (1), 194, 195, 199, 201, 202, 216 (2), 290.

It is open to a prosecutor to omit to call evidence and thereby procure an acquittal.

In a prosecution instituted under section 148 (1) (*a*) of the Criminal Procedure Code in a case where a Magistrate's Court has power to try summarily, a Crown Counsel is entitled, under section 199 of the Criminal Procedure Code, to appear and conduct the prosecution even against the complainant's will. In such a case if the Crown Counsel informs the Magistrate that, in the interests of justice, he would not be placing any evidence against the accused it is not open to the Magistrate, instead of acquitting the accused, to permit the complainant to lead evidence for the prosecution.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

Ananda Pereira, Senior Crown Counsel, with *V. S. A. Pullenayegum*, Crown Counsel, for the Petitioner.

S. Nadesan, Q. C., with *M. M. Kumarakulasingham, Siva Rajaratnam* and *S. Satyendran*, for the Complainant-Respondent.

Cur. adv. vult.

June 17, 1959. SANSONI, J.—

The complainant S. Ramer instituted proceedings against the two accused, who are respectively a Shroff and a Storekeeper of the Marketing Department, under section 148 (1) (*a*) of the Criminal Procedure Code before the Chief Magistrate, Colombo. The charge against them was that they sold to the complainant a certain quantity of dry chillies at a price in excess of the maximum controlled price, and thereby committed an offence punishable under the Control of Prices Act, No. 29 of 1950. When the accused appeared in Court in answer to the summons they were charged from a charge sheet and they severally pleaded not guilty.

When the case came up for trial on 28th November, 1958, the complainant was represented by a proctor while the accused were unrepresented. Mr. Pullenayegum, Crown Counsel, applied to the Magistrate in terms of section 199 of the Code to conduct the prosecution. The complainant's proctor objected and apparently stated that the Crown cannot appear for the prosecution and the defence. This cryptic statement seems to have been made because the accused had earlier informed the Magistrate

that Mr. Pullenayegum was appearing for them. Argument was heard on the objection and the Magistrate rightly held that the Attorney-General was entitled to appear and conduct the prosecution.

The case came on again on 6th February 1959 when Counsel appeared for the complainant while the accused were unrepresented. Mr. Pullenayegum then applied to withdraw the case under section 195 of the Code. He gave three reasons for making the application: they were (1) there was no sale under the Control of Prices Act; (2) even if there was a sale the accused did not sell; (3) the Act did not apply to the accused who had acted as officers of the Marketing Department. The Magistrate rightly refused the application, since it is only a complainant who is entitled to make it.

On 6th March when the trial was taken up again, Mr. Pullenayegum informed the Magistrate that the Attorney-General in the interests of justice would not be placing any evidence against the accused before the Court. The Magistrate then took time to consider his order, and on 11th March he made an order which concluded: "I therefore permit Crown Counsel to retire from the case and ask Counsel for the complainant to lead evidence for the prosecution". Crown Counsel thereupon stated that he was not seeking to retire from the conduct of the prosecution and that he objected to any one else being allowed to conduct the prosecution. The Magistrate noted the objection and overruled it.

The trial proceeded, with the complainant's counsel conducting the prosecution. The 2nd accused was acquitted at the close of the case for the prosecution, and further hearing was fixed for 18th March as against the 1st accused. In the meantime this application was made by the Attorney-General who asks this Court to set aside the order made on 11th March 1959 and to direct that an order of acquittal be entered forthwith in favour of the 1st accused.

Section 199 reads: "The Attorney-General, the Solicitor-General, a Crown Counsel, or a pleader generally or specially authorised by the Attorney-General shall be entitled to appear and conduct the prosecution in any case tried under this Chapter, but in the absence of the Attorney-General, the Solicitor-General, a Crown Counsel, and any such pleader as aforesaid the complainant or any officer of any Government department or any officer of any Municipality, District Council or Local Board may appear in person or by pleader to prosecute in any case in which such complainant or Government department or Municipality or District Council or Local Board is interested".

The section gives the Attorney-General and others under him the right to appear and conduct the prosecution in any summary trial, and only in case of their absence can the complainant or informant appear and prosecute in person or by pleader. In my opinion the Magistrate formed an erroneous impression of the statement made by Crown Counsel on 6th March. A decision not to lead evidence is totally different from a decision to retire from the case; and conducting the prosecution does not necessarily mean leading evidence. It may happen that all the available

evidence taken together will not establish the charge against the accused, and in such a case a fair-minded prosecutor will refrain from leading any evidence.

The Magistrate himself has said in the course of his order on 11th March that when the prosecutor does not lead any evidence against the accused, the usual order is an order of acquittal; but he chose not to make the usual order in this case, his reasons being: (1) that the Attorney-General cannot appear for the defence, nor should he be permitted while ostensibly appearing for the prosecution to be in fact appearing for the defence, and the attempt to conduct the prosecution was for the purpose of seeing that these accused were not tried by him; and (2) that the power of the Court to disallow the withdrawal of a case under section 195 is sufficient to overcome Crown Counsel's decision not to lead any evidence.

On the first point, I think that the Magistrate has been unduly influenced by the statement made at the first trial by the accused that Crown Counsel was appearing on their behalf, and by the application to withdraw the case. No counsel worthy of his calling would be guilty of such conduct as the Magistrate attributes to Crown Counsel, who explained in no uncertain terms the views of the Attorney-General in regard to this prosecution and why this particular course was being followed. On the second point, I do not think that section 195 has any bearing on section 199. The former section provides a method by which a complainant may withdraw a case; he cannot do so without the leave of the Magistrate, who has a discretion whether to allow the application or not. The latter section confers an unqualified right on the Attorney-General and his subordinates to appear and conduct a prosecution, and the Magistrate cannot prevent the exercise of that right.

The only question which arises on this application is whether counsel can be said to appear and conduct a prosecution under section 199 when he informs the Court that he does not intend to lead any evidence. The earlier statement which Crown Counsel made when he sought to withdraw the case set out the reasons for the decision which he ultimately took, but whether reasons are given or not, a prosecuting counsel has the right and even the duty to make such a decision.

Mr. Nadesan argued that it is not open to a Crown Counsel who claims to appear and conduct a prosecution to say that he is not leading evidence. He went so far as to say that no prosecutor, not even the Attorney-General, has a discretion in the matter; and that if there is evidence available he must lead it, and if he does not lead it he ceases to appear and conduct the prosecution and the complainant or his pleader would then be entitled to prosecute and lead evidence. With respect, I entirely disagree with this proposition. The logical result of accepting it would be to place a duty on prosecuting counsel to lead evidence even when he knows that all the available evidence will fail to establish the charge against the accused. No prosecuting counsel with any regard for the Court or his own position as an officer of justice need follow such a course. The only object of leading evidence for the prosecution is to establish the ingredients of the charge, and if counsel is not satisfied in his own mind

that the totality of the evidence available will achieve that result, he will be failing in his duty to the Court and to the accused if he were to insist on a fruitless recording of evidence and a senseless waste of time. It is quite wrong to suppose that a prosecuting counsel's duty is a mere mechanical leading of evidence regardless of the object for which evidence is led. If he is satisfied that the evidence is insufficient to prove the charge and insists on leading evidence, how can he in conscience ask the Court to convict the accused ?

I have not seen the duties and responsibilities of prosecuting counsel set out better than in an article written by Mr. Christmas Humphreys Q.C. when he was Senior Prosecuting Counsel, Central Criminal Court [1]. His view, and it is one with which I respectfully agree, is that " the prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor feel pride or satisfaction in the mere fact of success . . . . His attitude should be so objective that he is, so far as is humanly possible, indifferent to the result ". He continues : " I have never myself continued a prosecution where I was at any stage in genuine doubt as to the guilt, as distinct from my ability to prove the guilt, of the accused. It may be argued that it is for the tribunal alone, whether magistrate or jury, to decide guilt or innocence. I repeat that the prosecutor is fundamentally a minister of justice, and it is not in accordance with justice to ask a tribunal to convict a man whom you believe to be innocent ".

The obligation of prosecuting counsel to maintain scrupulous fairness in every case he handles is all the greater when he is Crown Counsel representing the Crown in a prosecution. For " the Crown is interested in justice, the defence in obtaining an acquittal within the limits of lawful procedure and Bar etiquette ". As Lord Hewart L.C.J. said in *Sugarman* [2], " It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown is not interested in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known and that justice should be done ". I cannot see how the jury can honestly be asked even to consider convicting the accused if counsel for the Crown is satisfied that such a result should not follow upon the evidence available to the Crown. He must first be satisfied that there is a *prima facie* case against the accused before he enters on the task of leading evidence.

Mr. Nadesan drew attention to the other sections of the Code in which the phrase " conduct the prosecution " or similar words occur. In a trial by a District Judge the same persons as those mentioned in section 199 conduct the prosecution (see section 201) ; under section 202 the Attorney-General may withdraw any indictment, while other prosecuting counsel can do so only with the permission of the District Judge. In a trial before the Supreme Court the prosecution must be conducted by the same persons who must all be advocates (see section 216 (2)) ; the Attorney-General can inform the Court that he will not further prosecute

[1] *Criminal Law Review (1955) page 739.*

[2] *(1935) 25 Cr. App. Rep. page 115.*

upon the indictment, while other prosecuting counsel may only withdraw the indictment with the consent of the presiding Judge. The result in each case is that proceedings against the accused are stayed and he is discharged.

My attention was also drawn to section 290 which deals with the compounding of offences, and the power of the Attorney-General to enter a *nolle prosequi* and pardon an accomplice. The argument based on these provisions was that when the legislature intended to confer a power to withdraw or terminate a prosecution, that power was expressly conferred ; and it would therefore be wrong to use section 199 in order to achieve indirectly, by the device of declining to lead evidence, what can only be done directly under the other sections already mentioned.

More to the point, however, is section 189 (1) which applies to summary trials : it does not compel a complainant or his pleader to lead evidence. Again, a complainant can, if he chooses, absent himself from Court and secure the acquittal of the accused (section 194). A Magistrate cannot, in a summary trial, force a complainant or his pleader to lead evidence. He can, in his discretion, enquire from the Attorney-General whether that officer wishes to exercise his right under section 199. But he cannot reverse the provisions of that section and permit the complainant or his pleader to prosecute in preference to the Attorney-General, as was done in this case.

The submission on behalf of the complainant in this case seems to spring from an imperfect appreciation of the proper attitude required of prosecuting counsel. The mere circumstance that there are other courses open to a prosecuting counsel who is of the opinion that the charge against the accused cannot be maintained, does not deprive him of the discretion to decide not to place evidence before the Court. Such a decision may have to be reached even in a trial for murder. Mr. Humphreys refers in his article to the Clapham Common murder trial (*R. v. Davies*[1]), where he sent a message to counsel appearing for four of the six youths committed for murder to the effect that he proposed to offer no evidence against their clients and that his decision was final. Nobody can possibly say that when he made that decision he had ceased to prosecute. I would prefer to say that he was prosecuting in accordance with the highest traditions of his profession and as a true minister of justice.

Since I reserved my order Mr. Nadesan drew my attention to a passage in Archbold which reads : " It is said that except where the Attorney-General enters a *nolle prosequi* it is necessary to obtain the leave of the court to abandon a prosecution after the indictment is signed, whether the prosecution desire to effect this purpose by offering no evidence, or otherwise ".[2]. A reference is made to a case heard in 1899. From the very wording of the passage the author would seem to be in some doubt about the matter, and it is far from clear whether the reference is to a judgment or not. I dare say that prosecuting counsel would always, as a matter of courtesy, in the first instance seek the leave of the Court, but I am not satisfied that such leave is a peremptory requirement.

[1] *(1954) A. C. 378.* [2] *33rd Edition page 1269.*

My reason for saying so is, firstly, what appears to have taken place in *R. v. Davies ;* secondly, there is an earlier passage at page 111 of Archbold, based on the case of *Elworthy v. Bird* [1], where Best C. J. said that it was open to a prosecutor to omit to call evidence and thereby procure an acquittal.

I think that the learned Magistrate should have made an order of acquittal when Crown Counsel stated that he was not placing evidence before the Court. I set aside the order he has made and direct him to enter an order of acquittal in respect of the 1st accused.

Order set aside.